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IN THE HIGH COURT OF JUDICATURE OF CHHATTISGARH AT BILASPUR

S.A. NO. 135 /2006 **Single Bench**

APPELLANTS (1) Sherali, son of Late Saiyad Shakurali, aged about 56 years, resident of Police Line Bilaspur (Chhattisgarh)

(2) Saiyad Tegali, son of Saiyad Sakurali aged about 46 years, Police, resident of Police Line Bilaspur, (Chhattisgarh)

P.R. No. 717/06 Presented by Shri [illegible] dated 20/3/06

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(3) Asgari Begum, W/O Mushtak Khan, aged about years, resident of village Dagori Tahsil Bilha, District Bilaspur (Chhattisgarh)

VERSUS

RESPONDENTS (1) Saiyad Israrali, son of Saiyad Akbar Ali aged about 58 years, Booking Clerk State Transport Main Road Mungeli, opposit Shushila Cloth shop Mungeli, District Bilaspur (Chhattisgarh)

(Defendent no. 1)

(2) State of Chhattisgarh, through Collector Bilaspur (Chhattisgarh)

(Performa Defen.2)

(3) Smt. Shakira Begum, aged about 66 years, W/O Maksud Ali, resident of Pratappur, Present Address Ramgopal Tiwari ward Pratapur, Tahsil Mungeli, District Bilaspur (C.G.)

(Defendent no. 3)

(2)

SECOND CIVIL APPEAL UNDER SECTION 100 OF THE CIVIL PROCEDURE CODE

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HIGH COURT OF CHHATTISGARH : BILASPUR

SECOND APPEAL NO. 135 OF 2006

Sherali and others

Versus

Saiyad Israrali & Others

J U D G M E N T

Post for 26-9-2006

Sd/-
Dhirendra Mishra
Judge

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HIGH COURT OF CHHATTISGARH : BILASPUR

SECOND APPEAL NO. 135 OF 2006

Sherali and others

Versus

Saiyad Israrali & Others

Present :- Shri J. S. Baraik, counsel for the appellants.

Shri Akhil Agrawal, Panel Lawyer for the State.

J U D G M E N T

Per Shri Dhirendra Mishra, J

Heard on admission.

2. This second appeal under Section 100 of the Code of Civil Procedure has been filed against the judgment and decree dated 30-11-2005 passed by the Additional District Judge, Mungeli in Civil Appeal No. 12-A/2005 whereby the appeal preferred by the appellants against the judgment and decree dated 21-9-2004 dismissing the Civil Suit No. 7-A/1988 passed by the trial Court has been dismissed.

(The parties hereinafter shall be referred to as per their description before the trial Court.)

3. Briefly stated the case of the plaintiff is that the suit land described in Schedule A and B of the plaint was ancestral property of late Gafur Ali. It was never

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partitioned. The widow of Gafur Ali is an old lady and was incapable of taking any decision. Gafur Ali died issueless. The defendant does not belong to the family of the plaintiffs and late Gafur Ali never made any gift with respect to 2.15 acres of land. The gift deed dated 18-7-1984 is fake. Gafur Ali was suffering from paralysis in the year 1983-84. Gafur Ali never made oral declaration about gifting the suit land to the defendant and the defendant has illegally got his name recorded over the suit land. Khatija Begum has also died in the year 1989 and they are her successors. Though Shakira Begum-the widow of Maksood Ali was not inclined that her name should be added, since her name has not been included as plaintiff, nevertheless she reposes full confidence on the plaintiffs and with these pleadings, a declaration has been sought that the plaintiffs and the defendant No. 3 are title holders and possessors of the suit property.

4. The defendant No. 1 in his written statement denied the averments of the plaint and stated that the disputed land was the exclusive property of Gafur Ali who obtained the same in a partition effected by Late Abdul Ali in his life time amongst his brothers and since then, all the four brothers were in possession over the respective shares and the land was recorded in the revenue papers separately. It was further averred that late Gafur Ali vide

oral Hiba dated 1st July 1984 had donated 2.15 acres of land from the suit land to the defendant No. 1 and he further executed a memorandum of gift dated 18-7-1984 in favour of defendant No. 1. He was mentally active. Though he suffered paralytic attack in the year 1985 but thereafter he was healthy, and the plaintiffs are not in possession over the suit land. In fact, from the date of Hibanama, the defendant No. 1 is in possession. There is no cause of action in favour of the plaintiffs.

5. On the basis of the pleadings of the respective parties, issues were framed and after recording the statements of witnesses from both the side, the trial Court dismissed the suit with a finding that the suit property was not ancestral property of Gafur Ali and Shakur Ali. It was, in fact, the property of Gafur Ali alone who donated 2.15 acres from the suit land to the defendant No. 1 and after the death of Khatija Begum, Makbool Ali Khan was not a necessary party and accordingly, the suit was dismissed. The appeal preferred by the plaintiffs has also been dismissed by the impugned judgment and decree, hence this appeal.

6. Learned counsel for the appellants submits that both the courts below erred by not applying Muslim Law regarding the Gift (Hiba). The fact that Gafur Ali suffered paralytic stroke two years before his death on 23-8-1985

and as a result of which he had become sick and paralysed and was not competent to exercise free discretion of making oral gift, has been ignored by both the Courts below, though the defendant No. 1 has admitted that he suffered paralytic stroke and was sick. It is argued that all the ingredients of Hiba have not been established by leading cogent evidence by the defendant No. 1 and in absence of it, oral Hiba could not be given effect to and on these arguments, it is contended that following substantial questions of law arise for adjudication of this appeal:-

i. Whether the Courts below erred in law by not applying the Muslim Law in deciding the case ?

ii. Whether the Courts below erred in law by holding that oral gift of the suit land was permissible and all ingredients of Hiba were not required to be proved by the respondents ?

iii. Whether in view of the admitted facts, late Gafur Ali who was old, sick and paralysed was competent to make gift (Hiba) of the suit land to the defendant No. 1 ?

iv. Whether the Courts below erred in holding that mutation of the suit land in name of respondent defendant No. 1 is in contravention of Rule 27 of the mutation?

7. I have heard the learned counsel for the appellants. I have perused the record and the judgments and decree passed by both the courts below. So far as findings recorded by the trial court which is subsequently affirmed by the appellate court regarding the nature of the property i.e. whether it is ancestral property or it is exclusive property of the deceased Gafur Ali, is concerned, both the Courts below after appreciating the evidence available on record and marshalling the evidence led by the parties arrived at the concurrent finding that the property in question was exclusive property of Saiyad Gafur Ali and not the ancestral property of Gafur Ali and Shakur Ali. The above finding is a concurrent finding of fact and no argument was advanced by the learned counsel for the appellants to challenge the above finding, and therefore, the appeal is to be considered only on the ground that whether the oral Hiba of 2.15 acres of land out of the suit land in favour of the defendant no. 1 was in accordance with the Muslim Law or not.

8. It is settled law that as per Muslim Law, gift by Mohammedan is not required to be in writing and consequently need not be registered under the Registration Act. Section 147 of the principles of Mohammedan Law by Mulla envisages that writing is not essential to the validity of gift either of movable or

immovable property. Section 148 requires that it is essential to the validity of a gift that the donar should divest him completely of ownership and dominion over the subject of the gift. Under Section 149, three essentials to the validity of the gift should be as under:

i. The declaration of the gift by donor;

ii. Acceptance of possession, expressed or implied by or on behalf of the donar;

iii. Delivery of possession of the subject of the gift by the donor to the donee.

9. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift, there should be delivery of possession of the subject of the gift and taking of possession of the gift by the donee, actually or constrictively and then only, the gift is complete.

10. If we examine the evidence available on record and the findings of the trial court in this regard, it is noticed that the learned trial court on the basis of statement of Saiyad Israrali-defendant No. 1, witness Shekh Naimullah D.W. 2 and Mirdade Ali D.W. 3 arrived at the conclusion that on 1-7-1984 on the eve of Id, Gafur Ali had made declaration after Namaz in the Mungeli Masque that he is donating his 2.15 acres land situated at Pratappur to Israrali and Israrali has accepted the gift and thereafter

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he had obtained possession. This declaration was made in presence of all the persons in the Masque. The above witnesses have also stated that on 18-7-1984, a memorandum of Hibanama Ex. D-1 was recorded which bears the signature of Gafur Ali. The witnesses have also stated that the after the gift of the suit property, the defendant No. 1 came into possession of the suit land and got his name mutated in the revenue records and revenue papers filed by the defendant No. 1 shows possession of the defendant No. 1 over the suit land. So far as the contention of the plaintiffs that the deceased Gafur Ali was not physically and mentally fit and he had suffered paralytic stroke is concerned, this aspect has also been taken care of by the trial court which has recorded that the deceased was retired government servant and he used to go to Mungeli from Bilaspur to receive his pension till his death. The trial Court has also considered that the land was mutated in the name of defendant No. 1 during the life time of Saiyad Gafur. His wife Khatija Begum was alive till 1989 and she never objected against the mutation in favour of the defendant No. 1 over the suit land nor she objected that the alleged Hibanama was fake and in the aforesaid circumstances, both the courts below held that the plaintiffs had no right to institute the suit. The finding has also been given that the plaintiffs have not been able to establish by leading cogent evidence that

the deceased was not in fit physical and mental condition at the time of the gift, and therefore, on this ground also, the challenge to Hibanama has not been accepted.

11. If we see the findings of the trial Court, it is manifestly clear that all the ingredients for a valid gift as per the Muslims Law has been established by defendant no. 1. Late Gafur Ali was the exclusive owner of the disputed property and who made oral declaration in front of witnesses in Masque on the eve of Id on 1-7-1984 and who subsequently executed a memorandum of gift on 18-7-1984 and in pursuance of the oral gift, the possession was obtained by defendant no. 1 immediately after execution of the gift and the land in question was recorded in the name of the defendant no. 1 on the basis of the oral gift during life time of the deceased Gafur Ali.

12. The above finding is a finding of the fact which is based on proper appreciation of the oral and documentary evidence available on record and the above finding is the concurrent finding of the fact recorded by both the courts below, therefore this Court is of the considered opinion that no substantial question of law as proposed of the learned counsel for the appellants arises for adjudication of this appeal. The appeal is devoid of substance and the same is dismissed at the admission stage itself.

Sd/-
Dhirendra Mishra
Judge